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699-860—63

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 343

ANTHONY P. MILLER, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 15a) is not yet reported.[1]

### JURISDICTION

The judgment of the United States Court of Claims was entered on April 5, 1963 (Pet. App. 15a). Petitioner's timely motion for reconsideration (R. 154)[2] was denied by the Court of Claims on June 7, 1963 (R. 180). The petition for a writ of certiorari was filed on August 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] "Pet. App." refers to petitioner's appendix, which is attached to the petition for a writ of certiorari.

[2] "R." refers to the record file by petitioner in this Court, which has not been printed.

## QUESTION PRESENTED

Whether petitioner, who allegedly could not arrange its anticipated financing of a Capehart housing project after an increase in the maximum interest rate had been authorized by the Federal Housing Commissioner, was entitled to the return of its bid deposit after defaulting on its obligation to arrange for the construction of the project.

## STATUTE INVOLVED

The pertinent portions of the Capehart Act, 42 U.S.C. 1594–1594f; 12 U.S.C. 1748–1748g, as amended, provide:

42 U.S.C. 1594

> (a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by

the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section [2305] of Title [10].

* * * * * *

12 U.S.C. 1748b

(a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installation, the [Federal Housing] Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: * * *.

(b)(3)(C) * * * The mortgage shall provide

for complete amortization by periodic payments within such terms as the Commissioner shall prescribe, but not to exceed thirty years from the beginning of amortization of the mortgage, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4½ per centum per annum of the amount of the principal obligation outstanding at any time. * * *

## STATEMENT

Petitioner seeks this Court's review of a judgment of the Court of Claims (upholding a decision of the Armed Services Board of Contract Appeals) which held petitioner not entitled to the return of its bid security deposit because of its default on its obligation to arrange for the construction of a Capehart Act military housing project.

### 1. The Capehart Act program

Under the Capehart Act, 42 U.S.C. 1594–1594f; 12 U.S.C. 1748–1748g, construction of urgently needed military housing projects can be financed from private sources. Simply stated, a contractor on a Capehart project arranges not only for the men, material and erection of the housing, but also for the money with which to pay for the construction. Banks, pension trusts and similar private institutions are sources for such financing. They advance the necessary money in exchange for a mortgage on the project, just as they might do with a private real estate development. The mortgage terms, however, must meet the requirements of the Capehart Act[3] and comply with the regulations of the Federal

[3] See, *e.g.*, 12 U.S.C. 1748b.

Housing Commissioner issued persuant to the Act.[4] The Federal Housing Authority then insures the repayment of the mortgage. When the project is completed, the Defense Department takes it over and assumes the mortgage obligations while the contractor receives the difference between the mortgage amount and his cost of construction. Thus, in a bid to erect a Capehart project, a contractor offers not only to arrange for, and see to, the physical construction work, but also to obtain private financing for the project upon mortgage terms specified in the invitation to bid.[5]

**2. The facts and proceedings in the instant case**

In 1958, the Army Corps of Engineers issued invitation to bid upon several Capehart Act housing projects in New York State. At the same time, the Engineers also asked for separate bids to construct related access roads, utility lines and the like. This latter "off-site" work was to be paid for directly out of appropriated government funds. The bids on both the Capehart and off-site projects were to be opened on the same day, November 20, 1958 (Pet. App. 2a).

The invitation to bid on the Capehart projects specified, *inter alia*, that the builder was to provide private financing by means of a twenty-five year mortgage at an annual interest rate of 4¼% (Pet., p. 6). Each bid was required to be accompanied by a cer-

[4] See, *e.g.*, 24 C.F.R. 803.

[5] A more detailed summary of Capehart Act housing operations is contained in the opinion of the Court of Claims (Pet. App. 16a–17a).

tified check, payable to the Treasurer of the United States, in the amount of 2% of the F.H.A. estimated replacement cost. This sum was a security deposit which, as the invitation expressly advised bidders, would be forfeited as liquidated damages in the event that the successful bidder did not effect a closing with the F.H.A. within a prescribed time (Pet. App. 18a–19a). A "Notice to Bidders" accompanied the invitation to bid on the Capehart project (Pet. App. 19a). That notice cautioned prospective bidders that the

> Federal National Mortgage Association will be unable to make further commitments to purchase long-term mortgages under the Capehart housing program and bidders should therefore submit a bid for this project only if interim and long-term financing will be obtainable from sources other than FNMA.

Petitioner bid on one of the Capehart projects and included with its bid a security deposit of $10,397.50. When the bids were opened petitioner was the lowest qualified bidder, having offered to construct and finance the particular project for some $519,800.00. However, all bids on the "off-site" work were rejected by the Engineers as excessive, and it was determined to advertise for new bids for that work. To avoid the necessity of also readvertising for the Capehart projects, and to preserve for petitioner its low bid position, the parties arrived at an understanding that was incorporated in a letter from petitioner to the contracting officer, which we have set out for con-

venience in the margin.* In substance, petitioner agreed to accept an award of the project on the usual terms, subject to a single additional qualification: If no acceptable bid for the related off-site work was received, the award to petitioner could be cancelled.

Thereafter, on January 27, 1959, the Engineers issued to petitioner the award of the Capehart project, termed a "Letter of Acceptability." Except for the contingency mentioned, it was in the standard form for such awards (Pet. App. 6a *et seq.*). Among other items, the Letter of Acceptability required petitioner, no later than the closing date of March 27, 1959, to (Pet. App. 7a):

> Complete the necessary arrangements with a mortgage lender acceptable to the Commissioner as a mortgagee for financing the total cost, including your profit, of said housing project through the execution of a mortgage and mortgage note for a period of 25 years and bearing interest at 4¼ per centum per annum, with the

*"It is understood by the undersigned that the New York District Office has advertised for bids for off-site work in connection with the Capehart on-site project at Grand Island, New York, and contemplates opening bids toward the end of February 1959. Also, that it will not be possible to close the on-site contract unless the Department of the Army can make an award of the off-site work.

"In view of the foregoing, the undersigned is agreeable to receive a qualified letter of acceptability for the on-site work contingent upon the Department obtaining an acceptable off-site bid; and further agrees to waive any claim it may have against the Government for any costs it may incur in preparation for a closing, in the event that the letter of acceptability must be canceled because of failure to receive an acceptable off-site bid." (Pet. App. 20a–21a.)

option of prepayment without penalty at the end of fifteen years * * *.

The Letter of Acceptability again put petitioner on notice that failure to perform its obligations by the designated closing date (unless extended by the contracting officer) would result in the cancellation of the award and the forfeiture of its bid security deposit (Pet. App. 9a).

On February 19, 1959, an acceptable bid for the off-site work was received by the Engineers. Promptly that same day a letter was sent to petitioner notifying it of this fact (Pet. App. 12a). Petitioner was again "reminded that you will be required to be ready for a closing on March 27, 1959 as provided in the Letter of Acceptability."

On March 2, 1959, the Federal Housing Commissioner announced that the maximum allowable interest rate for all Capehart projects had been increased from 4¼% to 4½% (Pet. App. 13a). The Defense Department made provisions for advertising future Capehart projects at the new rate, and also for adjustments where a project had been bid but not yet awarded (*i.e.*, where no Letter of Acceptability had been issued). However, projects already awarded were to be completed at the interest rate previously agreed upon (Pet. App. 13a).

Petitioner claimed that, because of the increase in the maximum permissible rate, he was unable to obtain a 4¼% mortgage without the payment of a discount. (Pet. App. 25a).[7] The Contracting Officer

[7] The industry's practice with regard to discounts is explained at some length in the opinion of the Court of Claims (Pet. App. 25a–26a, n. 5).

expressed his surprise that petitioner had bid on the project without a previous firm mortgage commitment, but nevertheless gave petitioner several extensions of the time in which to arrange suitable financing (Pet. App. 26a). Petitioner failed to obtain the necessary financing and, on April 30, 1959, the contracting officer declared that petitioner was in default and forfeited petitioner's bid security as liquidated damages (Pet. App. 29a). The project was then readvertised and new bids received and considered, albeit upon mortgage financing at 4½% per annum. However, for reasons not stated in the record, the Defense Department later decided against constructing the project. (Pet. App. 4a).

Petitioner appealed to the Armed Services Board of Contract Appeals, which affirmed the decision of the contracting officer. Petitioner then brought an action in the Court of Claims to recover its deposit. That court granted the government's motion for summary judgment and dismissed petitioner's complaint (Pet. App. 16a).

## ARGUMENT

Petitioner concededly defaulted on its freely assumed obligation to arrange for the construction of a Capehart military housing project financed by a 4¼%, 25-year mortgage. The United States thereupon retained petitioner's bid deposit as liquidated damages for petitioner's default, as the invitation to bid provided. Petitioner now seeks return of its deposit on either of two theories: First, because the government allegedly impaired its ability to obtain a 4¼% mortgage, and second, because the project upon

which petitioner defaulted was never built. Both these contentions are plainly lacking in merit and need not be considered by this Court.

1. In *Horowitz* v. *United States*, 267 U.S. 458, 461, this Court held that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." This holding affirmed a series of Court of Claims decisions to the same effect, and has been consistently followed.* The act which petitioner complains of was both "public" and "general." The Federal Housing Commissioner was specifically authorized by statute to raise the maximum interest rate, 12 U.S.C. 1748(b)(3)(C), (pp. 3–4, *supra*), and the raise was applicable generally to all Capehart construction and not merely to the one small unit which petitioner had been awarded.

Petitioner does not challenge the rule stated in *Horowitz*, but asserts only that it is inapplicable here because petitioner is suing for the recovery of a deposit and not for damages. It should be observed, however, that the security deposit was computed so as to be the equivalent of liquidated damages caused by petitioner's breach of contract. Consequently, if petitioner were permitted to recover its deposit, it

* *Maxwell* v. *United States*, 3 F. 2d 906 (C.A. 4), affirmed, 271 U.S. 647; *Gothwaite* v. *United States*, 102 Ct. Cl. 400; *Standard Accident Insurance Co.* v. *United States*, 103 Ct. Cl. 607, certiorari denied, 326 U.S. 729; *Hallman* v. *United States*, 107 Ct. Cl. 555; *Piggly Wiggly Corporation* v. *United States*, 112 Ct. Cl. 391, 420; *J. B. McCrary Company, Inc.* v. *United States*, 114 Ct. Cl. 12.

would be forcing the public treasury to bear the loss attributable to petitioner's breach.

Moreover, there is no inequity to the government's claim here, as there was in *United States* v. *Peck*, 102 U.S. 64.[9] The notice accompanying the original invitation to bid warned petitioner that it should submit a bid "only if interim and long-term financing will be obtainable from sources other than [the Federal National Mortgage Association]" (p. 6, *supra*). Petitioner was well aware of the Capehart program's requirements and should have obtained a firm commitment at the time of its bid. Petitioner also had five weeks after the conditional award of the contract and one-and-one-half weeks after being notified that an acceptable off-site bid had been received in which to obtain a 4¼% mortgage before the raise was authorized.[10] And the authorization merely permitted a higher *maximum* mortgage interest rate; it did not prohibit 4¼% mortgages.

2. Nor does the fact that the Capehart project was ultimately not constructed, for reasons arising after petitioner's default, warrant further review of peti-

[9] In *United States* v. *Peck*, Peck had contracted to obtain and deliver hay from a certain area. Before Peck could perform, the government sent another contractor to gather the same hay at increased expense. The government was not permitted to recover the excess cost from Peck since it had rendered his performance impossible by causing someone else to gather the hay.

[10] The Armed Services Board of Contract Appeals found that 4¼% financing had actually been offered to the petitioner during the time when it held the conditional award. For purposes of the motion for summary judgment, the Court of Claims disregarded this finding. (Pet. App. 27a.)

tioner's claim for return of his security deposit. The amount agreed upon as liquidated damages was 2 percent of the total contract figure of some $519,800.00. This was a reasonable estimate of the damages suffered by the United States because of petitioner's failure to close—consequences which are obviously difficult to evaluate. The United States was clearly inconvenienced as a result of the delay caused by petitioner's failure to close, and it was put to the expense of readvertising the project and reviewing new bids. Under the circumstances, the amount of the deposit was entirely appropriate as a reasonable measure of liquidated damages, *United States* v. *Le Roy Dyal Co.*, 186 F. 2d 460 (C.A. 3), certiorari denied, 341 U.S. 926, and its retention was not a mere forfeiture resulting in the Government's unjust enrichment, as petitioner contends.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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